

AUG 27 2003



Michael N. Milby, Clerk of Court

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

In re ENRON CORPORATION SECURITIES
LITIGATION

§ Civil Action No. H-01-3624
§ (Consolidated)

This Document Relates To:

MARK NEWBY, et al., Individually and On
Behalf of All Others Similarly Situated,

Plaintiffs,

vs.

ENRON CORP., et al.,

Defendants.

THE REGENTS OF THE UNIVERSITY OF
CALIFORNIA, et al., Individually and On
Behalf of All Others Similarly Situated,

Plaintiffs,

vs.

KENNETH L. LAY, et al.,

Defendants.

**IMPERIAL COUNTY EMPLOYEES RETIREMENT SYSTEM'S AND
IHC HEALTH PLANS, INC.'S MOTION TO INTERVENE
UNDER FED. R. CIV. P. 24(b)(2)**

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I. INTRODUCTION

Imperial County Employees Retirement System ("ICERS") and IHC Health Plans, Inc. ("HPI") (collectively "Intervenors") seek leave to intervene as plaintiffs and additional class representatives under Federal Rules of Civil Procedure 23(d)(2) and 24(b)(2). ICERS and HPI satisfy the requirements to intervene. Intervention cures alleged standing defects and ensures all valid claims are prosecuted by Lead Plaintiff, which comports with the Court's order that "the litigation should proceed as a unified class with a strong Lead Plaintiff." *In re Enron Corp. Sec. Litig.*, 206 F.R.D. 427, 451 (S.D. Tex. 2002). Lead Plaintiff supports the Intervenor's Motion because the addition of ICERS and HPI as named plaintiffs will allow Lead Plaintiff to more broadly represent the interests of the class.

Intervenors purchased certain Foreign Debt Securities which were artificially inflated because of defendants' fraudulent conduct and material misrepresentations and omissions.¹ Plaintiffs seek damages arising from losses sustained because of defendants' deceptive scheme. As unnamed class members with legal and justiciable rights that are aligned with the other proposed class representatives in *Newby*, Intervenors have a substantial interest in the subject matter of the *Newby* action and in its success. Just like other named plaintiffs, Intervenors seek damages arising from losses sustained because of defendants' fraudulent scheme.

Lead Plaintiff and Intervenors respectfully request that the Court consider this motion for intervention before ruling on pending motions to dismiss where some defendants have argued that no named plaintiff has standing to bring claims on behalf of those who purchased Foreign Debt Securities. For all of the reason stated herein, this motion should be granted.

II. STATEMENT OF FACTS

The Regents' action is brought on behalf of a class consisting of persons who purchased Enron Corp. equity and debt securities between October 19, 1998 and November 27, 2001. Intervenors, like other class members, seek to recover damages resulting from their purchases of

¹Allowing ICERS to intervene cures any perceived defects relating to standing to bring certain claims under §12(a)(2) of the Securities Act of 1933 ("1933 Act"). HPI and ICERS also have claims under §10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 promulgated thereunder.

Enron-related securities, the repayment of which was dependent upon Enron's credit, financial condition and ability to pay.

A. Imperial County

Imperial County Employees Retirement System ("ICERS") manages approximately \$308 million in retirement funds for county workers and retirees. Management of the retirement system is vested in the Board of Retirement, which consists of nine members. The fund is independently administered by Imperial County and is authorized to file independent legal actions. ICERS purchased \$345,000 par value of Marlin Notes on July 12, 2001. *See* Certification of ICERS attached hereto as Ex. A.

B. IHC Health Plans

IHC Health Plans, Inc. ("HPI") is a health maintenance organization and third-party administrator. HPI provides health insurance products and administration services to businesses and individuals in the Intermountain region of the western United States. HPI purchased \$2,000,000 par value of Yosemite notes on May 18, 2001. HPI also purchased Enron common stock during the Class Period. *See* Certification of HPI attached hereto as Ex. B.

III. ARGUMENT

A. Lead Plaintiff May Invite Additional Named Plaintiffs to Join This Action in Order to Represent More Broadly the Interests of the Class

Two recent decisions in large, complex securities cases demonstrate the propriety of this motion. In *In re Initial Pub. Offering Sec. Litig.*, 214 F.R.D. 117 (S.D.N.Y. 2002) and *In re WorldCom, Inc. Sec. Litig.*, No. 02 Civ. 3288(DLC), 2003 U.S. Dist. LEXIS 8245 (S.D.N.Y. May 19, 2003), Judges Scheindlin and Cote granted lead plaintiffs' request to add named plaintiffs to pursue 1933 Act claims. In *WorldCom*, defendants sought dismissal of certain claims under §§11 and 12(a)(2) of the 1933 Act for lack of standing. The lead plaintiff invited named plaintiffs who had standing to bring such claims to join in the lawsuit. The defendants argued that including three named plaintiffs with standing failed to cure lead plaintiff's standing deficiency. Judge Cote held this argument "blinks reality and requires no further discussion" because, much as is the case here, "[t]he Underwriter Defendants have not shown that there is any legal bar to a lead plaintiff asking

other plaintiffs to join a lawsuit as named plaintiffs in order to represent more broadly the interests of the class at the time of the filing of the consolidated class complaint." 2003 U.S. Dist. LEXIS 8245, at *81.

Similarly, in *Initial Pub. Offering*, Judge Scheindlin granted lead plaintiff's motion to join new plaintiffs over the defendants' objections. Judge Scheindlin held the "purpose of the lead plaintiff section of the PSLRA was never to do away with the notion of class representatives or named plaintiffs in securities class actions." 214 F.R.D. at 122. Judge Scheindlin explained, "[n]owhere is it suggested that the concept of 'lead plaintiff' was intended to be coterminous with 'named plaintiffs' or 'class representatives.'" *Id.* at 123. The fact that lead plaintiff is to be selected based on objective criteria apart from the nature of claims they can bring, reasoned the court, "strongly suggests the need for named plaintiffs in addition to any lead plaintiff.... It stands to reason that in many cases ... the plaintiff with the largest financial interest may not have standing to sue on all causes of actions." *Id.* (citing *Enron*, 206 F.R.D. at 451). Here, the inclusion of ICERS and HPI to pursue claims based on the Foreign Debt Securities allows Lead Plaintiff to more broadly represent the interests of the class and comports with notions of judicial economy, especially in a complex litigation such as this.

B. Intervention Is Proper Under Rule 23

Under Fed. R. Civ. P. Rule 23(d), unnamed class members, such as Intervenor, are permitted "to intervene and present claims or defenses, or otherwise to come into the action." Fed. R. Civ. P. Rule 24(b)(2) allows permissive intervention when (1) application is timely, (2) there exists a question of law or fact common to both the intervenor's claims and those of the existing plaintiffs, and (3) intervention will neither unduly delay nor prejudice the rights of the original plaintiffs. *See Stallworth v. Monsanto Co.*, 558 F.2d 257, 264 n.8 (5th Cir. 1977).

1. Intervenor's Motion Is Timely

Under Rule 24, the determination of timeliness is left to the sound discretion of the court. *Stallworth*, 558 F.2d at 269; 6 James Wm. Moore, *Moore's Federal Practice* §24.10 (3d ed. 2003). This element is construed broadly in favor of the party seeking intervention. *Stallworth*, 558 F.2d at 269; *Westlands Water Dist. v. United States*, 700 F.2d 561, 563 (9th Cir. 1983). Motions to

intervene should be viewed in the liberal atmosphere of the Federal Rules of Civil Procedure, which are construed to "secure the just, speedy, and inexpensive determination of every action." Fed. R. Civ. P. 1; *McDonald v. E.J. Lavino Co.*, 430 F.2d 1065, 1074 (5th Cir. 1970). The Fifth Circuit has articulated a four-factor test to assess the timeliness of a motion to intervene. The factors are:

1. "The length of time during which the would-be intervenor knew or reasonably should have known of his interest in the case before he petitioned for leave to intervene";
2. "The extent of prejudice to the existing parties to the litigation may suffer as a result of the would-be intervenor's failure to apply for intervention as soon as he actually knew or reasonably should have known of his interest in the case";
3. "The extent of the prejudice that the would-be intervenor may suffer if his petition for leave to intervene is denied"; and
4. "The existence of unusual circumstances militating either for or against a determination that the application is timely."

Stallworth, 558 F.2d at 264-66. The most important consideration in deciding whether a motion for intervention is timely is whether any delay in bringing the motion has prejudiced the existing parties to the case. *McDonald*, 430 F.2d at 1074; *Mayo v. Hartford Life Ins. Co.*, 214 F.R.D. 458, 462-63 (S.D. Tex. 2002) ("Federal courts should allow intervention where no one would be hurt and greater justice could be attained.") (citation omitted). As the Fifth Circuit wrote in *McDonald*, the timeliness requirement under Rule 24 "was not intended to punish an intervenor for not acting more promptly but rather was designed to insure that the original parties should not be prejudiced by the intervenor's failure to apply sooner." 430 F.2d at 1074 (citation omitted).

Here, all the elements favor intervention. Intervention will not result in prejudice or delay, but instead will conserve judicial and litigant resources. Intervenors' motion comes within three months after the operative complaint, the First Amended Consolidated Complaint, was filed on May 14, 2003. Discovery has just begun, hence there is no risk of duplicative depositions or written discovery. Finally, because Intervenors are represented by the same counsel as Lead Plaintiff and the other class representatives, there will be no delay from addition of counsel to the case.

2. Intervenor's Claims and the Original Plaintiffs' Claims Raise Common Questions of Law and Fact

Under the second prong of Fed. R. Civ. P. 24(b), intervention is permissible where "an applicant's claim or defense and the main action have a question of law or fact in common." *See Epstein v. Weiss*, 50 F.R.D. 387, 395 (E.D. La. 1970) ("Intervention is sanctioned by Rule 24(b)(2) of the Federal Rules which provides that any person may be permitted to intervene if his claim and the main action have a common question of law and fact."); *Moore, supra*, §24.11 ("The phrase 'common question of law or fact' should be given its plain meaning and read in the disjunctive. A showing of either a question of law *or* a question of fact in common between the main action and applicant's claim or defense is all that is needed to vest judicial discretion to grant permissive intervention.") (footnote omitted).

Because Intervenor's seek to intervene as additional class representatives, the test for a common question of law or fact is easily met. *See Davis v. Southern Bell Tel. & Tel. Co.*, 149 F.R.D. 666, 670 (S.D. Fla. 1993) ("As an additional class representative, [intervenor] will assert the *same* claims as those of the existing plaintiffs. Accordingly, the *same* questions of law and fact will arise with respect to both the claims of [intervenor] and those of Plaintiffs.") (emphasis added); *Epstein*, 50 F.R.D. at 395 ("It is apparent from reading Rule 23 that the right to intervene in a class action is available.").

Intervenor's have adopted the First Amended Consolidated Complaint filed in *Newby* in its entirety and only the Enron securities they purchased differentiate them from Lead Plaintiff and the other named plaintiffs.² Under these circumstances, the requirements of Rule 24(b) are met. *See Deutschman v. Beneficial Corp.*, 132 F.R.D. 359, 381 (D. Del. 1990); *Eley v. Morris*, 390 F. Supp. 913, 917 (N.D. Ga. 1975) (similar, if not identical, questions of law and fact were presented by the intervenor's claims); *United States Steel Corp. v. Multistate Tax Comm'n*, No. 72 Civ. 3438 (CHT), 1974 U.S. Dist. LEXIS 12396, at *8 (S.D.N.Y. Feb. 5, 1974) (original plaintiff's complaint adopted in its entirety); *Alexander v. Hall*, 64 F.R.D. 152, 156 (D.S.C. 1974) (government's motion to

²See attached Declarations of Jacque Millard and Barbara A. McFetridge indicating ICERS and HPI adopt the First Amended Consolidated Complaint and stand ready to serve as class representatives.

intervene, adopting plaintiff's complaint as its complaint-in-intervention, sufficient under liberal construction of Rule 24(b)).

3. None of the Parties Will Be Unduly Prejudiced

The final element under Rule 24(b) concerns "whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties." *Degge v. Boulder*, 336 F.2d 220, 222 (10th Cir. 1964) (citation omitted). Where an intervenor is represented by the same counsel as the original plaintiff, is asking for the same form of relief, and alleges common questions of law or fact, no prejudice results from permitting intervention. *See Davis v. Smith*, 431 F. Supp. 1206, 1209 (S.D.N.Y. 1977) ("The proposed intervenors are represented by the same counsel as the plaintiffs already in this action, and their participation facilitates the effective adjudication of the legal issues in dispute."), *aff'd*, 607 F.2d 535 (2d Cir. 1978); *Demeulanaere v. Rockwell Mfg. Co.*, 23 F.R.D. 689, 690 (S.D.N.Y. 1957).

Here, intervention will not result in any delay, prejudice the rights of the original parties or impede the orderly processes of the Court. In *Moe v. Dinkins*, 533 F. Supp 623 (S.D.N.Y. 1981), *aff'd*, 669 F.2d 67 (2d Cir. 1982), the court granted the plaintiff's motion to intervene as additional plaintiffs and class representatives pursuant to Rule 24(b). The *Moe* court noted intervention added to the representativeness of the named class members. *Id.* at 626. Here, intervention will likewise allow the rights of the class to be more broadly represented.

And in *Epstein*, a plaintiff-in-intervention was permitted to intervene under Rule 24(b) because: (1) his complaint was substantially the same as the original plaintiffs'; (2) his request for relief was identical to the original plaintiffs'; (3) he was represented by the original plaintiffs' counsel; and (4) the similarity of the claims of the intervenor and of the original plaintiffs presented common questions of law and fact. 50 F.R.D. at 395. After considering the factors, the *Epstein* court held no prejudice or delay would result.

As in *Epstein*, the Intervenors here raise questions of law and fact nearly identical to those raised by Lead Plaintiff in *Newby* and are represented by the same counsel and request the same relief. Under these circumstances, the existing parties cannot be prejudiced by intervention. *See Weisman v. Darneille*, 89 F.R.D. 47 (S.D.N.Y. 1980) (because there was no prejudice to the existing

parties, considerations of judicial economy compelled the court to exercise its discretion and allow intervention).

Again, discovery in the present case has only just begun. Intervention will not, therefore, materially alter or interfere with the course of these proceedings. *United States Steel*, 1974 U.S. Dist. LEXIS 12396, at *8 ("[B]ecause eleven of the twelve applicants are represented by plaintiffs' counsel, defendants need not fear being deluged with 'additional questions, objections, briefs, arguments, motions and the like'") (citation omitted).

Allowing intervention will avoid the filing of additional actions, which will needlessly absorb the Court's resources and delay the progress of this litigation. *Weisman*, 89 F.R.D. 47. Intervention is the most efficient and economic procedure available to plaintiffs to protect their rights.

IV. CONCLUSION

The requested intervention meets all the criteria of Rule 24, as the application for intervention is timely and should neither delay these procedures nor prejudice any defendant. Accordingly, Intervenor respectfully request that the Court grant their motion to intervene.

DATED: August 27, 2003

Respectfully submitted,

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Washington Counsel

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing IMPERIAL COUNTY EMPLOYEES RETIREMENT SYSTEM'S AND IHC HEALTH PLANS, INC.'S MOTION TO INTERVENE UNDER FED. R. CIV. P. 24(b)(2) document has been served by sending a copy via electronic mail to serve@ESL3624.com on this 27th day of August, 2003.

I further certify that a copy of the foregoing IMPERIAL COUNTY EMPLOYEES RETIREMENT SYSTEM'S AND IHC HEALTH PLANS, INC.'S MOTION TO INTERVENE UNDER FED. R. CIV. P. 24(b)(2) document has been served via overnight mail on the following parties, who do not accept service by electronic mail on this 27th day of August, 2003.

Carolyn S. Schwartz
United States Trustee, Region 2
33 Whitehall Street, 21st Floor
New York, NY 10004



Mo Maloney

**CERTIFICATION OF NAMED PLAINTIFF
PURSUANT TO FEDERAL SECURITIES LAWS**

IMPERIAL COUNTY BOARD OF RETIREMENT ("Plaintiff") declares:

- 1. Plaintiff has reviewed a complaint and authorized its filing.**
- 2. Plaintiff did not acquire the security that is the subject of this action at the direction of plaintiff's counsel or in order to participate in this private action or any other litigation under the federal securities laws.**
- 3. Plaintiff is willing to serve as a representative party on behalf of the class, including providing testimony at deposition and trial, if necessary.**
- 4. Plaintiff has made the following transaction(s) during the Class Period in the securities that are the subject of this action:**

<u>Security</u>	<u>Transaction</u>	<u>Date</u>	<u>Price Per Share</u>
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See attached Schedule A.

- 5. During the three years prior to the date of this Certificate, Plaintiff has not sought to serve or served as a representative party for a class in an action filed under the federal securities laws except as detailed below:**

- 6. The Plaintiff will not accept any payment for serving as a representative party on behalf of the class beyond the Plaintiff's pro rata share of any recovery, except such reasonable costs and expenses (including lost**

wages) directly relating to the representation of the class as ordered or approved by the court.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 16th day of July, 2003.

**IMPERIAL COUNTY BOARD OF
RETIREMENT**

By: *Dorinda D. Yarnall*
Its: RETIREMENT ADMINISTRATOR

SCHEDULE A
SECURITIES TRANSACTIONS

Acquisitions

<u>Acquisition Date</u>	<u>Type of Debt</u>	<u>Face Amount</u>	<u>Price Per Bond</u>
07/12/2001	<u>Marlin Water Trust II</u> 8.31% due 7/15/2003	\$345,000	\$100.00

Sales

<u>Sale Date</u>	<u>Type of Debt</u>	<u>Face Amount</u>	<u>Price</u>
12/10/2001	<u>Marlin Water Trust II</u> 8.31% due 7/15/2003	\$345,000	\$115.88

**CERTIFICATION OF NAMED PLAINTIFF
PURSUANT TO FEDERAL SECURITIES LAWS**

IHC HEALTH PLANS ("Plaintiff") declares:

1. Plaintiff has reviewed a complaint and authorized its filing.
2. Plaintiff did not acquire the security that is the subject of this action at the direction of plaintiff's counsel or in order to participate in this private action or any other litigation under the federal securities laws.
3. Plaintiff is willing to serve as a representative party on behalf of the class, including providing testimony at deposition and trial, if necessary.
4. Plaintiff has made the following transaction(s) during the Class Period in the securities that are the subject of this action:

<u>Security</u>	<u>Transaction</u>	<u>Date</u>	<u>Price Per Share</u>
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See attached Schedule A.

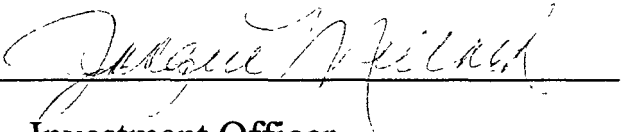
5. During the three years prior to the date of this Certificate, Plaintiff has not sought to serve or served as a representative party for a class in an action filed under the federal securities laws except as detailed below:

6. The Plaintiff will not accept any payment for serving as a representative party on behalf of the class beyond the Plaintiff's pro rata share of any recovery, except such reasonable costs and expenses (including lost

wages) directly relating to the representation of the class es ordered or approved by the court.

I declare under penalty of perjury that the foregoing is true and correct.
Executed this 28th day of July, 2003.

IHC HEALTH PLANS, INC.

By: 
Its: Investment Officer

Schedule A

<u>Security</u>	<u>Transaction</u>	<u>Date</u>	<u>Price Per Share</u>
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Purchased by internal fixed income investment officer:

Yosemite Securities Trust	Purchase	5/18/2001	103.984
\$2,000,000 par value			

Purchased by external equity manager - Mackay Shields:

Enron Common Stock 100 Shares	Purchase	2/22/2000	69.555
Enron Common Stock 100 Shares	Disposal	5/21/2001	55.158
Enron Common Stock 100 Shares	Purchase	2/23/2000	70.538
Enron Common Stock 100 Shares	Disposal	5/22/2001	54.009
Enron Common Stock 200 Shares	Purchase	2/24/2000	69.435
Enron Common Stock 200 Shares	Disposal	5/22/2001	54.009
Enron Common Stock 100 Shares	Purchase	2/29/2000	66.492
Enron Common Stock 100 Shares	Disposal	5/22/2001	54.009
Enron Common Stock 400 Shares	Purchase	4/18/2000	72.706
Enron Common Stock 400 Shares	Disposal	8/13/2001	42.249
Enron Common Stock 200 Shares	Purchase	12/1/2000	71.863
Enron Common Stock 200 Shares	Disposal	8/13/2001	42.249
Enron Common Stock 100 Shares	Purchase	12/14/2000	74.625
Enron Common Stock 100 Shares	Disposal	8/13/2001	42.249
Enron Common Stock 200 Shares	Purchase	3/21/2001	65.580
Enron Common Stock 200 Shares	Disposal	8/13/2001	42.249
Enron Common Stock 200 Shares	Purchase	3/23/2001	61.390
Enron Common Stock 200 Shares	Disposal	8/13/2001	42.249
Enron Common Stock 300 Shares	Purchase	4/10/2001	57.470
Enron Common Stock 300 Shares	Disposal	8/13/2001	42.249
Enron Common Stock 300 Shares	Purchase	4/24/2001	61.990
Enron Common Stock 300 Shares	Disposal	8/13/2001	42.249

